APPEAL NO. 93318

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On March 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) was intoxicated based on a blood alcohol test reporting more than .10. Claimant asserts that the respondent (carrier) did not show that there was no alcohol on claimant's skin when the blood was drawn, that blood was not drawn within 30 minutes of the accident so the blood alcohol test is not conclusive, and that claimant showed that he was not intoxicated through his testimony, the police report, and the emergency room report.

DECISION

Finding that the decision is supported by sufficient evidence of record and reflects that the provisions of the 1989 Act were correctly applied, we affirm.

Claimant is a truck driver who testified that prior to reporting for work the night of the accident, he went to his fiancee's birthday party. At the party he states that he drank six to eight beers (he did not say whether these were glasses or bottles or what was the size of the container) with the last one consumed by 7:30 p.m. "roughly." He also testified that he had these beers before having dinner, which was characterized as large. He added that he reported to work at 12:30 to 1:00 a.m.

The police report (Carrier Exhibit No. 9) shows that claimant's truck left the highway and came to rest upside down at 2:45 a.m. on (date of injury). The investigator stated in the report that claimant fell asleep, woke up, and turned the wheel too sharply. The form has a series of numbers with a legend beside them for the investigator to set forth as contributing factors--numbers 23 and 40 were selected, which stand for "failed to drive in single lane" and "fatigued or asleep," respectively. Factors not chosen by the investigator included numbers 67 and 9 which represent "under influence-alcohol" and "defective or no trailer brakes."

Claimant testified further that he was traveling at 62 to 65 miles per hour when he swerved to miss debris in the road. As he did so a front tire blew out and his trailer brakes did not work. He did not have any alcohol after reporting for work, but was taking Nyquil for congestion. He stated that he had to be cut out of the cab and he cannot recall all that took place when he was brought to the hospital. He said he was not intoxicated at the time of the accident.

The emergency room notes (Carrier Exhibit No. 4) indicate that the admitting physician was (Dr. D). He diagnosed at that time a spinal fracture and shock. Among other entries is noted "etoh level." The earliest time stated on this note is 4:00 a.m. on (date of injury). Carrier Exhibit No. 8 is the doctor's note, also showing Dr. D as the physician, providing a history, a physical examination, assessment of the patient, and a plan for

treatment. Dr. D recorded, "[t]here is an anterior wedge fracture and dislocation at T-12 . . . which for the most part obliterates the canal." He assessed "T-12 paraplegia secondary to fracture dislocation at T-12" and other injuries. He admitted claimant to the hospital for surgical consideration to fuse the spine. Carrier Exhibit No. 6 shows blood alcohol level to be 122 MG/DL and states that 100 MG/DL is the legal definition of intoxication. (The legal definition of intoxication, as set forth in TEX. REV. CIV. STAT. ANN. art. 6701l-1 [*see infra*], is an alcohol concentration of .10 or more. It is further described as the number of grams of alcohol per 100 milliliters of blood.) Other laboratory studies were also reported in regard to the claimant at the same time. There are two times reported immediately beneath the intoxication results on the laboratory report that show 0430 and 0546, but the evidence does not show what either stands for.

In addition to offering the medical evidence, carrier called as an expert witness, Mr. M. His qualifications as an expert in the area of toxicology were not attacked. He testified that the claimant's blood sample would probably have been taken at about 4:15 which is one and one-half hours after the accident. His testimony also included that an adult usually decreases his blood alcohol level about .02 per hour so that the test result of claimant of .122 obtained one and one-half hours after the accident would reflect approximately .152 at the time of the accident. Whether a person slept or exercised, the rate of decrease would remain about the same. The witness did state that the rate of absorption of the consumed alcohol into the bloodstream would be slowed by ingestion of food. For example, after consumption of alcohol the maximum alcohol level in the bloodstream is reached after approximately 30 minutes. If a large meal is ingested at that time it can slow absorption so that the maximum level of alcohol in the bloodstream is not reached until two hours, or perhaps two and one-half hours after it is consumed. The point was then made that after such period of two hours has elapsed the same maximum level of alcohol would be reached.

The expert witness also stated that he is familiar with emergency room procedures in regard to blood alcohol samples. He is not specifically knowledgeable of the emergency room in question in (city), but did speak by phone with a laboratory technician at the hospital in question. He verified that the testing was reliable. He did not disagree that if there were alcohol on the needle that took the sample, it could provide an inaccurate result. He added that the time of the testing itself was not material. In regard to medication, he said that some medication can lower one's tolerance of alcohol and some can act with alcohol to increase the affect; he did not know what was in Nyquil. He concluded that his calculations were based on known facts, not speculation, and he opined that claimant at the time of the accident was significantly impaired. He recited that the alcohol level of claimant affects judgment, coordination, reaction time, and perception. Alcohol is a depressant which can make one sleepy. In his opinion, claimant was probably intoxicated at the time of the accident. The expert stated that he is being paid to testify at this hearing and said he had testified many times for the "prosecution" and also had testified for the "defense" in some cases.

Claimant testified that in addition to drinking beer before the accident, he also ate a large meal. He did not say what time he ate. There was no evidence that claimant ate a large meal within two hours of the accident so that the rate of absorption at the time of the accident may have caused a lower blood alcohol content than that showed at the time the blood sample was later taken. In addition there was no showing how a large meal, if eaten less than two hours before the accident, would affect absorption when claimant testified that he had quit drinking at about 7:30 p.m., approximately seven hours before the accident. While questions were raised by claimant about contaminated needles and false results in a blood alcohol test, there was no evidence presented that indicated any problem with the sample, the testing, or the identification of claimant in relation to the multiple results, including blood alcohol level, on the laboratory report.

The Appeals Panel has reviewed Articles 8308-1.02(30) and 3.02(1) of the 1989 Act in regard to alcohol intoxication. Cases under the prior workers' compensation law, TEX. REV. CIV. STAT. ANN. art. 8309, § 1 have also been reviewed. They include Texas Employers' Insurance Ass'n v. Monroe, 216 S.W.2d 659 (Tex. Civ. App.-Galveston 1948, writ ref'd n.r.e.) and March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ denied). *See* Texas Workers' Compensation Commission Appeal No. 91012, dated September 11, 1991, which stated:

> The employee had the burden to prove injury arose in the course of employment; the carrier had the burden to present evidence of intoxication; and if carrier presented such evidence, employee then had the burden to show he was not intoxicated at the time of injury as part of the proof that the injury occurred in course of employment.

The hearing officer correctly reviewed the evidence in the context of the 1989 Act which provides that an insurance carrier is not liable for compensation if "the injury occurred while the employee was in a state of intoxication." (There is no requirement that the intoxication must have been a contributing factor to the injury.) The 1989 Act also defines intoxication as "the state of having an alcohol concentration of 0.10 or more, where "alcohol concentration" has the meaning assigned to it in Article 6701l-1, Revised Statutes; or the state of not having the normal use of mental or physical faculties. . . ." (emphasis added). These provisions indicate that the hearing officer was correct in stating that .10 is a legal definition of intoxication, not just a presumption level. She did not find that the claimant had shown his laboratory results were unreliable.

The evidence of record is sufficient to support the hearing officer's Finding of Fact No. 5 which said, "[a]t the time of Claimant's motor vehicle accident of (date of injury), Claimant had a blood alcohol concentration greater than .10." She also found that at the

time of the accident, claimant did not have the normal use of his mental and physical faculties, but this finding is not necessary to the decision that claimant was intoxicated at the time of the accident and that he take nothing. *See* Texas Workers' Compensation Commission Appeal No. 92148, dated May 29, 1992, which applied the "normal use of faculties" test when a blood alcohol test showed less than .10.

The claimant asserts that since the blood sample was not taken within 30 minutes of the time of the accident, it can only be viewed as presumptive, not conclusive. No authority is cited for this statement. The statute imposes no quantitative time limit for taking a blood sample in order to meet the quantitative limit of .10 it sets in defining intoxication. Under the evidence presented at this hearing, the time elapsed between the accident and the taking of a blood specimen was not shown to have adversely affected the interest of the claimant.

The medical evidence of blood alcohol intoxication, coupled with the testimony of the expert witness, provided sufficient evidence for the hearing officer to conclude that claimant was intoxicated at the time of the accident. The hearing officer's decision does not indicate that claimant's testimony and speculation as to food consumption and/or procedures within the hospital setting involving claimant's blood sample showed the test results to be unreliable. The decision and order of the hearing officer are not against the great weight and preponderance of the evidence and are affirmed. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge